IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01963/2013

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision and Reasons Promulgated**
On 3 November 2014	**On 11 November 2014**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KIRTIS KRISTOPHER GLENFIELD MILLAR

Respondent

Representation:
For the Appellant: Ms P Hastings, Home Office Presenting Officer
For the Respondent: Mr R Singer, Counsel instructed by Fisher Meredith

DECISION AND REASONS

1. The respondent shall hereinafter be referred to as the claimant. The Secretary of State has been granted permission to appeal the decision of the First-tier Tribunal (First-tier Tribunal Judge Moore and Mrs S I Hewitt) allowing the appeal of the claimant against the decision of the Secretary of State to make a deportation order against him on 11 September 2013 under Section 32(5) of the UK Borders Act 2007. The Secretary of State found that the removal of the claimant under Section 32(4) of the UK Borders Act 2007 to be conducive to the public good for the purposes of Section 3(5)(a) of the

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Immigration Act 1971. The Secretary of State was not satisfied that the claimant fell within one of the exceptions for automatic deportation under Section 32(5) of the UK Borders Act 2007, following convictions for violent disorder for which he was sentenced to a total of 42 months' imprisonment.

2. The claimant appealed the Secretary of State's decision on the basis that his deportation would breach the UK's obligations under the 1950 Convention on Human Rights. The First-tier Tribunal upheld his appeal.

3. The claimant has previous convictions. Between June 2006 and June 2009 he was convicted and sentenced in respect of a number of criminal offences committed whilst he was a juvenile. The offences included robbery, taking a motor vehicle without consent, theft and possession of cannabis. The sentences imposed included supervision orders, attendance centre for twelve hours and a conditional discharge for six months in respect of the possession of cannabis. In January 2013 he was convicted of possessing cannabis for which he was fined £100.

4. In a nutshell the Secretary of State's grounds upon which permission was granted argued that the panel failed to consider the claimant's right to family life under paragraph 399(b) but instead proceeded to consider family life under Article 8 and that the panel did not make any findings as to exceptional circumstances.

5. At the hearing before me Mr Singer sought to correct paragraph 3 of the skeleton argument he had submitted on behalf of the claimant. He accepted that the claimant could not satisfy paragraph 399(b)(i) of the Immigration Rules. This is because he had not lived in the UK with valid leave continuously for at least the fifteen years immediately preceding the date of the immigration decision. The claimant was born on 12 September 1991 in Barbados. According to his evidence he had come to the United Kingdom in 2002 when he was 10 years of age. He was eventually granted indefinite leave to remain in the United Kingdom in March 2010. Therefore, quite apart from the fact that the claimant had not lived continuously in the United Kingdom for at least the fifteen years immediately preceding the date of the immigration decision which was taken on 11 September 2013, he did not have valid leave to remain until March 2010.

6. There are two sub-Sections to paragraph 399(b). I have already dealt with sub-section (i) above, which as already noted, Mr. Singer conceded the claimant could not satisfy. Sub-section (ii) states "there are insurmountable obstacles to family life with that partner continuing outside the UK." Ms Hastings submitted, and I agreed, that because of the word "and" linking the two sub-sections, the claimant would have to satisfy both sub-sections in order to satisfy paragraph 399(b). His inability to satisfy sub-section (i) meant that he could not satisfy sub-section (ii). Consequently I find that Mr Singer's argument at paragraphs 5 and 6 of his skeleton argument where he had submitted that the panel accepted that there were insurmountable obstacles to the relationship between the claimant and his partner Shanice Wilson continuing

outside of the UK did not contain alleged error of law, was not an argument that could succeed.

7. Ms Hastings relied on the grounds submitted on behalf of the Secretary of State. She submitted that instead of the panel considering the Immigration Rules and applying them, they elect to consider Article 8 outside of the Immigration Rules. The only exceptional circumstance identified by the panel was the claimant's partner's choice as to the reason why the relationship could not continue in Barbados. There was no health issue, no overwhelming economic issue in this case. Ms Hastings submitted that there are family members in Barbados. The facts are nothing out of the ordinary such that there are exceptional circumstances that go beyond and above the Immigration Rules.

8. Mr Singer submitted that whatever the complaint was about the structure of the determination, it did not contain any error that could amount to a material error. He referred to his skeleton argument that was before the panel. He had relied on the case of **MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC)** where it was held that even if a decision to refuse an Article 8 claim under the new Rules is found to be correct, judge must still consider whether a decision is in compliance with a person's human rights under Section 6 of the Human Rights Act and in automatic deportation cases where the removal would breach a person's Convention rights. Thus, in the context of deportation and removal cases, the need for a two-stage approach in most Article 8 cases remains imperative. The Court of Appeal endorsed that approach and stated that if the claimant succeeds on an application of the new Rules at the first hurdle, that is he shows that paragraph 399 or 399A applies, then it can be said that he has succeeded on a one-stage test. But if he does not, it is necessary to consider whether there are circumstances which are sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation. This is an exercise which is separate from a consideration of whether paragraph 399 or 399A applies. It is the second part of a two-stage approach which is required by the new Rules. In light of these decisions Mr. Singer submitted that as the claimant did not meet paragraph 399 or 399A, the Tribunal was required to apply a two-stage test. Mr Singer accepted that although the panel did not expressly state whether they were allowing the appeal under the Immigration Rules, they were well aware from his skeleton argument how the claimant's case was argued. It was argued on the basis that the Tribunal had to consider whether there were exceptional circumstances whereby the public interest was outweighed by the claimant's Article 8 rights. In his skeleton argument he set out the principles of **SS (Nigeria) [2013] EWCA Civ 550** which held that the more pressing the public interest the more serious is the deportation. Although this is not expressly quoted, he would argue that the Tribunal had it in mind. The decision to allow the claimant's appeal on Article 8 grounds was open to the Tribunal on the reasons given by them.

9. I find that the Tribunal at paragraphs 2 to 5 identified the substantive issues under appeal. At paragraph 32 they identified the legal framework and recited case law in respect of Article 8 of the ECHR. The case law included **MF (Nigeria).**

10. At paragraph 40 the Tribunal identified that paragraph 396 of the Rules established that where a person is liable to deportation, the public interest requires it. Where the Secretary of State must make a deportation order in accordance with Section 32 of the UK Borders Act 2007, it is in the public interest to deport.

11. The Tribunal then looked at paragraph 398 where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the ECHR. At paragraph 41 the Tribunal recognised that the claimant has been convicted of serious offences for which he was sentenced to a total of 42 months' imprisonment. The Tribunal took note of the Immigration Rules which state that it would only be in exceptional circumstances that a person's right to family and/or private life would outweigh the public interest in deporting a person where they have been sentenced to a period of imprisonment of less than four years, but at least twelve months. At this point I must add that it is in assessing whether paragraph 399 or 399A applies, and if it does not, that it will only be exceptional circumstances that the public interest will be outweighed by other factors.

12. I find that the determination could have been better structured so that the reader was left in no doubt as to whether the claimant's appeal could succeed under the Immigration Rules. The Tribunal did not do that. I agree with Mr. Singer that the Tribunal's failure to so did not amount to a material error of law. It was apparent from the facts that the claimant's appeal could not succeed under the family and private life provisions under the Immigration Rules. This led to Mr. Singer putting the claimant's argument on the basis that the Tribunal had to consider whether there were exceptional circumstances whereby the public interest was outweighed by the claimant's Article 8 rights. This required the application of the two-stage approach identified in **MF (Nigeria)** and the principles in **Nagre [2013] EWHC 720 (Admin)** where it would only be in exceptional circumstances that a person's right to family and/or private life would outweigh the public interest in deportation.

13. I find that in view of the way the claimant's case was put to the Tribunal by Mr. Singer, the Tribunal's findings at paragraphs 42 to 47 could be described as exceptional circumstances. That was what they had in mind at paragraph 41 before proceeding to make their findings at paragraphs 42 to 47. The Tribunal considered the close bond the claimant has with his mother and his two younger siblings, Nathan and Stacia. They found that although the claimant was an adult, the relationship the claimant had with his mother went beyond the normal emotional ties due to the fact that he is the only son of his mother who remains in the United Kingdom with whom the mother continues to rely on for emotional support. Consequently they found that the claimant satisfied the **Kugathas** test. However, the significant factor in all of this was the claimant's relationship with his partner, Shanice Wilson.

14. The Tribunal were impressed by the evidence given at the hearing not only by Shanice Wilson but by both her parents. They found that evidence pointed to a deep

and meaningful relationship between the claimant and his partner. They found at paragraph 42 that the claimant now regretted his criminal offending. Mr & Mrs Wilson believed that the daughter was genuinely in love with the claimant and would continue to encourage him and support him. Shanice has not only regularly visited the claimant in prison but she was also accompanied on some occasions by her mother. The Tribunal considered that despite the deep relationship they believe that Ms Wilson would not go to Barbados if the claimant were to be removed. Her life, career and family are all in the UK. She is a British citizen. Consequently in these circumstances were the claimant to be deported to Barbados, the relationship between Ms Wilson and the claimant would break down with no reasonable likelihood of marriage in the future. In the circumstances the Tribunal found at paragraph 47 that the claimant's right to family life would be infringed in that his subsisting relationship with his partner would irretrievably break down, since she would not accompany him to Barbados for the reasons they had given. Consequently the Tribunal accepted that the claimant's right to family life outweighed the public interest in his deportation.

15. The Tribunal then looked at the claimant's private life and found that he had lived in the UK since the age of 10 and for the past twelve years. In so doing they considered paragraph 399A(b) of the Immigration Rules, which they said defines the criteria which must be satisfied before a person's private life outweighs the public interest for deportation in line with Article 8 of the EHCR. The Tribunal found that while the claimant could not demonstrate that he had lived continuously in the United Kingdom for half of his life preceding the date of the immigration decision, the period of time he had spent here was a significant factor notwithstanding the nature and seriousness of the index offence. They were satisfied that the claimant would not be able to re-establish and maintain a private life if deported to Barbados. Consequently they accepted that the claimant's right to private life outweighed the public interest in seeing him deported and that the deportation would breach Article 8 of the ECHR.

16. Having considered the determination as a whole, I do not accept the submission that the Tribunal engaged in a freewheeling Article 8 exercise. The Tribunal had at the forefront of its mind the fact that the claimant was a foreign criminal as defined in Section 32 of the UK Borders Act in that public interest requires his deportation. They looked at the evidence before them and found that there were exceptional circumstances which outweighed the public interest in his deportation. The Tribunal heard the evidence and I find that they came to conclusions that were open to them.

17. For these reasons I find that the Tribunal's decision allowing the claimant's appeal shall stand.

Signed Date

Upper Tribunal Judge Eshun **3 November 2014**